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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 514

WILLIAM MACDONALD, JAMES J. COLEMAN, R. E. MACDONALD, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 25-39) is reported at 83 F. Supp. 702.

JURISDICTION

The judgment of the Court of Claims was entered on May 2, 1949 (R. 39). A motion for a new trial, filed on June 22, 1949 (R. 40), was overruled on October 3, 1949 (R. 40). The petition for a writ of certiorari was filed on December 29, 1949. The jurisdiction of this Court is presumably invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the revised change order, eliminating an allowance for excess cost of lumber on the ground that no consideration existed for the agreement of the contracting officer to pay therefor, was valid and binding on petitioners, particularly in view of the fact that they failed to invoke the administrative appeal procedure stipulated by the contract within the prescribed time.

STATUTE AND CONTRACT PROVISIONS INVOLVED

Section 201 of the First War Powers Act, 55 Stat. 839, 50 U. S. C. App. 611, Executive Order 9001, 6 F. R. 6787, and the provisions of the contract are set forth in pertinent part in the Appendix, *infra*, pp. 12-16.

STATEMENT

On May 19, 1942, petitioners and the United States executed a lump sum contract on a standard government form for the construction of a modification center for airplanes at Fort Crook, Nebraska. By its terms, petitioners agreed to furnish all plant, labor and materials, tools, supplies and equipment, and to perform all work required to carry out the contract (R. 26). The work was to be completed within sixty days of the date of the acceptance of Letter Contract (R. 8).

In submitting their bid, petitioners stipulated that they should be furnished all priority required to enable them to obtain material and equipment without delay (R. 25). Petitioners then entered into a contract with the Nebraska Building Supply

& Lumber Company of Omaha, Nebraska, to furnish the lumber necessary for the performance of the contract (R. 26). Since the lumber required was difficult to obtain in required quantities because of market conditions, petitioners secured permission from respondent's contracting officer to purchase lumber through the Central Procurement Agency, an agency set up by the United States to procure materials for government projects. However, deliveries of lumber purchased through the Central Procurement Agency were also slow in arriving and it became apparent that completion of the project would be delayed. Accordingly, the contracting officer instructed petitioners to procure lumber from other sources wherever possible, without cancelling its previous orders through the Central Procurement Agency, even though such action resulted in duplicate orders. (R. 27.) Petitioners were advised by the contracting officer in several letters that petitioners would be reimbursed for the difference in cost above Central Procurement prices and that duplicate lumber obtained by petitioners through the Central Procurement Agency would be taken over by the Government at invoice prices (R. 27-30).

Upon completion of the contract work on November 6, 1942, and acceptance as of October 14, 1942, a disagreement arose as to the correct amount of the adjustment to be made. Agreement was finally reached on the sum of $17,363.27, and the contracting officer issued a change order (Change

Order 33), signed by him and petitioners (R. 30-31). This sum included an adjustment both for the excess cost of lumber procured from other sources and for the cost of duplicate lumber obtained through the Central Procurement Agency (R. 31).

Thereafter, the Division Engineer, the contracting officer's superior, disallowed the excess cost on the ground that it was petitioners' obligation, under the contract, to secure the lumber from whatever source it could be obtained and at whatever price it was necessary to pay for it, and that petitioners had, therefore, done nothing more than they were required to do (R. 31-32, 38). Accordingly, a revised change order was issued, eliminating the adjustment for excess cost (R. 32). Payment was received by petitioners on the basis of the revised change order and was accepted under protest (R. 32).

On June 19, 1943, petitioners wrote the contracting officer that they would not sign the revised change order and requested further consideration. On June 23, 1943, petitioners were informed by letter that their letter of June 19 was regarded as a complete refusal to sign the revised change order and that the change order would be distributed to higher authorities unsigned, in accordance with Article 3 of the contract. The letter further advised petitioners of their right to appeal pursuant to Article 15 of the contract. (R. 32.)

Although Article 15 expressly requires an appeal to be taken within thirty days, no appeal was filed

until August 14, 1943 (R. 32). Accordingly, the Board of Contract Appeals of the War Department, the duly authorized representative of the Secretary of War, dismissed the appeal as untimely (R. 33).

The Court of Claims dismissed the petition on two grounds: (1) Since petitioners did no more under the contract than they were required to do, the original change order allowing petitioners the excess cost of lumber was unenforceable for want of consideration; (2) Petitioners failed to perfect their appeal to the head of the department within the thirty days required by the contract (R. 38-39).

ARGUMENT

Petitioner's argument runs as follows: Article 3 of the standard form Government contract gives to the contracting officer exclusive authority to make changes in the contract and to adjust claims arising from changes (Pet. 3, 5, 6, 12, 20); the First War Powers Act (55 Stat. 839) and Executive Order 9001 (6 F. R. 6787), promulgated thereunder, eliminates the necessity for legal consideration to support a modification of the contract (Pet. 10-13); there was consideration for the change made herein (Pet. 13-21); in any event, a valid compromise agreement (Change Order 33) was executed under Article 3 by petitioners and the contracting officer (Pet. 21-28). None of these contentions has merit. Moreover, the petition completely ignores the alternative basis for decision below,

namely, that petitioners did not take a timely appeal under the administrative appeal provisions of the contract to the Secretary of War. We submit, therefore, that there is no occasion to review the judgment below.

1. Petitioners misapprehend the provisions of Article 3 of the contract, apparently because there was deleted therefrom the customary provision that no change involving an estimated increase of more than five hundred dollars would be ordered unless approved in writing by the head of the department or his duly authorized representative (R. 26). While Article 3 provides that the contracting officer may make changes in the plans and specifications and that an equitable adjustment shall be made if the change results in an increase of the amount due under the contract, provided that the claim therefor is made within ten days,[1] it also provides that where the claim is made "at any time prior to the date of final settlement", the adjustment could be

[1] It is highly doubtful that Article 3 envisages the modification of the contract here attempted. That article simply permits the contracting officer to "make changes in the drawings and/or specifications of this contract and within the general scope thereof." Herein, the contracting officer did not change the drawings or specifications, he changed the contract price. We know of no provision in the standard form Government contract which authorizes such a modification of the contract. It is, of course, a familiar rule that the United States is neither bound nor estopped by the unauthorized acts of its officers or agents. *United States* v. *Stewart*, 311 U.S. 60; *United States* v. *City and County of San Francisco*, 310 U.S. 16; *Wilber National Bank* v. *United States*, 294 U.S. 120; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389; *United States* v. *Chickasha Cotton Oil Co.*, 115 F. 2d 135 (C.A. 10); *United States* v. *Thomas*, 107 F. 2d 765 (C.A. 5).

made by the contracting officer only with the approval of the head of the department or his duly authorized representative. It was under this last clause that the contracting officer undertook to make an adjustment in the instant case which his superior refused to approve. In those circumstances, petitioners were required by the explicit language of Article 3 to proceed as provided in Article 15, if they desired further review.

a. We think it unnecessary to labor the point that the contracting officer's superior was correct in holding that petitioners did no more under the contract than they were under an obligation to do. As the court below observed (R. 38):

> * * * Plaintiff was required to secure the lumber from whatever source it could obtain it and to pay therefor whatever price it had to pay. Plaintiff's contract was for a lump sum and it was required to do whatever might be necessary in order to perform it.
>
> * * * It was no part of the contract that plaintiff should secure this lumber through the Central Procurement Agency. * * * when it developed that sufficient lumber could not be secured from this source, it was its obligation under the contract to get it wherever it could at whatever price it had to pay for it.
>
> It follows from this that the Government received from the plaintiff no more than it was entitled to receive and, therefore, that the change order allowing plaintiff more than it was entitled to under the contract was without consideration and, therefore, is unenforceable.

b. Nor is extended discussion necessary to refute petitioners' contention that a binding compromise agreement was effected under Article 3. As noted above, adjustments of claims arising from changes can be made only "with the approval of the head of the department or his duly authorized representative." Here, the Division Engineer, the duly authorized representative of the head of the department, expressly disapproved of the adjustment. It is plain, therefore, that no valid compromise adjustment was ever reached.

2. Apparently realizing the vulnerability of their argument based on Article 3, petitioners urge that, in view of the First War Powers Act and Executive Order 9001, consideration was not a requisite to the modification of their contract. Unquestionably, if the change herein made was undertaken in the exercise of authority properly delegated under the First War Powers Act, no consideration was necessary. However, that act is not self-executing. It does not purport to subject all wartime Government contracts to its provisions. It comes into play only where an official to whom authority has been delegated, deems it not to be incompatible with the public interest to exercise that authority. That delegation of authority under the Act is essential to the exercise thereof is demonstrated by the action of the President in specifically delegating such authority to various departments and agencies (50 U. S. C. A. App. 611, pp. 242-247). There is nothing

in the record to indicate that, during the period here involved, any power under the act was delegated to the contracting officer herein. In fact, no such power was delegated during this period to any administrative official of the War Department subordinate to the Director, Purchase Division, Headquarters, Army Service Forces. See 7 F. R. 9268-9270; 10185. We submit, therefore, that the First War Powers Act has no application.

3. Finally, petitioners' claim is barred because of their failure to take a timely administrative appeal to the Secretary of War, or his duly authorized representative. As already noted, petitioners' claim rests upon the authority delegated to the contracting officer under Article 3. That article provides that "if the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof." Although failure to reach an agreement herein was based on a question of law, we agree with the court below that Article 3 required petitioners to appeal to the Secretary of War. In incorporating the appeal procedure of Article 15, Article 3 does not purport to limit that procedure to questions of fact. Apart from Article 3, however, resort to an administrative appeal was required by paragraph 1-11 of the specifications of the contract (*infra*, p. 16), which provides for such appeal—

> If the contractor considers any work demanded of him to be outside the requirements

> of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, * * *

In *United States* v. *Moorman,* No. 97, this Term, decided January 9, 1950, this Court held an identical provision to be valid and binding whether the dispute be one of law or fact. And see *United States* v. *Holpuch Co.,* 328 U. S. 234; *United States* v. *Beuttas,* 324 U. S. 768; *United States* v. *Blair,* 321 U. S. 730; *United States* v. *Callahan-Walker Constr. Co.,* 317 U. S. 56; *United States* v. *McShain, Inc.,* 308 U. S. 512; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387; *Plumley* v. *United States,* 226 U. S. 545; *United States* v. *Gleason,* 175 U. S. 588; *Martinsburg & Potomac R. R.* v. *March,* 114 U. S. 549; *Kihlberg* v. *United States,* 97 U. S. 398. This Court has repeatedly held that "in the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court." *United States* v. *Holpuch Co., supra,* at 240; *United States* v. *Blair, supra; United States* v. *Callahan-Walker Constr. Co., supra.* Having failed to file a timely appeal, petitioners' claim is barred.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1950.

APPENDIX

1. Section 201 of the First War Powers Act, 55 Stat. 839, 50 U. S. C. App. 611, provides:

> The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided,* That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting; *Provided further,* That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further,* That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

2. Executive Order 9001, 6 F. R. 6787, provides in pertinent part as follows:

> TITLE I
>
> 1. By virtue of the authority in me vested by the Act of Congress, entitled "An Act to expedite the prosecution of the War effort",

approved December 18, 1941, (hereinafter called "the Act") [sections 601 et seq. of Appendix to Title 50] and as President of the United States and Commander-in-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.

* * * * *

3. The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any percentum of the contract price, and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of the rights which may have accrued under the contract, or the amendments or modifications thereof.

* * * * *

3. Article 3 of the contract (R. 8-9) provides:

Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the

amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

4. Article 15 of the contract (R. 14) provides:

Article 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

5. Paragraph 1-11 of the specifications of the contract provides:

1-11. *Claims, Protests and Appeals.* If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision in writing, thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions or decisions of the contracting officer shall be final and conclusive. All appeals from the decisions of the contracting officer authorized under the contract shall be addressed to the Secretary of War, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the contractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefore in the contract.

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